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IN THE

Supreme Court of the United States

October Term, 1965

No. [redacted] 43

RONALD R. CICHOS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Petitioner, Ronald R. Cichos, prays that a writ of certiorari issue to review the judgments of the Supreme Court of Indiana entered in the above case on July 6, 1965, and October 1, 1965.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana is reported at 208 N. E. 2d 685, and is as yet unreported in the official Indiana Reports. The opinion on rehearing, also officially unreported, is found in 210 N. E. 2d 863. Such opinions are appended hereto.

JURISDICTION

The judgment of the Supreme Court of Indiana was made and entered on July 6, 1965. A copy thereof is appended hereto at the Appendix pp. 1). The petition for re-hearing was denied with an opinion on October 1, 1965. A copy of such is appended hereto at Appendix pp. 8). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

The instant case presents the following question:

1. Is the Constitutional right against double jeopardy guaranteed by the Fifth Amendment of such basic characteristic in the law so as to be immune from statute encroachment under the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth and Fourteenth Amendments to the Constitution of the United States involved in this appeal and Burns Indiana Statutes Ann. Sec. 9-1901, 9-1902 are set forth in the Appendix hereto at pp. 14-15. The statutes under which Petitioner was charged, Burns Ind. Stat. Ann. Sec. 47-2001(a) and Sec. 10-3405 are also set forth in the Appendix at p. 14-15.

STATEMENT

This criminal action was brought against Petitioner upon a second amended affidavit, charging the offenses of involuntary manslaughter, Burns Ind. Stat. Ann. Sec. 10-3405 and reckless homicide, Burns Ind. Stat. Ann. Sec. 47-2001 (a). The cause was tried by jury and a verdict of guilty returned as to reckless homicide. The jury was silent as to a verdict on the charge of involuntary man-

slaughter. Petitioner successfully appealed his conviction to the Indiana Supreme Court and the cause was reversed and a new trial ordered. At the second trial Petitioner was not only recharged with the crime of reckless homicide, in Count 1 but also again charged with the crime of involuntary manslaughter in Count 2. (R. p. 23-25)

Petitioner filed a special plea of former jeopardy under the Indiana and the United States Constitution addressed to Count 2, the pertinent parts of which are as follows:

> "Comes now the defendant, Ronald Richard Cichos, by his counsel, Warren Buchanan and John B. McFaddin, and for an additional special plea herein, alleges and says:
>
> "1. That on November 6, 1958, a second amended affidavit in this cause was filed in the Parke Circuit Court; that in said second amended affidavit this defendant was charged in two counts with the statutory offenses of reckless homicide, by count 1 thereof, and involuntary manslaughter, by count 2 of said second amended affidavit; that a bench warrant was issued by the Parke Circuit Court for the arrest of said defendant on said charges; that this defendant was thereupon arrested and held to answer to said charges; that a copy of the second amended affidavit herein charging this defendant with such offenses, certified as true and correct by the Clerk of this Court, is attached hereto, made a part hereof and marked Exhibit "A".
>
> "2. That by its terms, said second amended affidavit charged that this defendant on September 28, 1958, in Parke County, Indiana, commited the offenses of reckless homicide and involuntary manslaughter by then and there, unlawfully and feloniously, operating a motor vehicle upon and along a high way at and in the County of Parke, in the State of Indiana, while under the influence of intoxicating liquor, and that the said defendant then and there drove and operated his said automobile into and against an automobile

then and there driven and operated on said highway and in and on which one Frank Glen Barber and Shella Mae Barber were then and there riding and that the said Frank Barber and Shella Mae Barber were injured and wounded as a result of such collision and that they died as a result thereof on September 28, 1958.

"3. That the defendant was arraigned in the Parke Circuit Court, before the judge thereof, on *November 24, 1958,* and entered a plea of not guilty to the charges of reckless homicide and involuntary manslaughter as contained in said second amended affidavit.

"4. That during the months of November and December, 1959, this cause was tried in the Parke Circuit Court, and that the jury, at the trial of said cause, returned a verdict finding the defendant guilty of reckless homicide, as charged in said second amended affidavit; that the jury, at the trial of said cause, did not return a verdict finding the defendant guilty of involuntary manslaughter, as charged in count 2 of the second amended affidavit herein; that the Court rendered judgment of conviction and sentence on the verdict in this cause on February 16, 1960; that the defendant filed a motion for a new trial in said cause, and that such motion was over-ruled by the Court; that on August 12, 1960, and within the time granted by the Supreme Court of Indiana for such purpose, the defendant filed a transcript of the record and assignment of errors on an appeal of said conviction to said Supreme Court of Indiana; that on July 2, 1962, the Supreme Court of Indiana reversed the judgment of conviction of the defendant and this cause was remanded to this Court with instructions to sustain defendant's motion for new trial; that this cause is now assigned for re-trial in this Court for June 13, 1963; that a copy of the verdict returned by the jury herein finding the defendant guilty only of the offense of reckless homicide, certified as true and correct by the Clerk of this Court, is attached hereto, made a part hereof and marked Exhibit "B".

"5. That the defendant is now charged with the Statutory offenses of reckless homicide and involuntary manslaughter, as charged in counts 1 and 2, respectively, of the second amended affidavit herein; that the jury in the original trial of this cause, by failing to return a verdict as to the second count of the second amended affidavit herein, by implication, acquitted the said defendant of the charge of involuntary manslaughter.

"6. That the prior prosecution and acquittal of the defendant on the charge of involuntary manslaughter would now bar any further prosecution of said defendant based upon the same crime.

"7. That the facts necessary to convict the defendant on count 2 of the second amended affidavit now pending in this Court were adjudicated by the failure of the jury at the prior trial of the return a verdict on said count, thus acquitting said defendant of said crime; that the defendant cannot be placed in jeopardy, the second time, for the same offense; that prosecution to a final judgment of the offense in the prior trial of the same is a bar to his prosecution as to the second count of the second amended affidavit now pending in this Court.

"WHEREFORE, the Defendant prays that the charge of involuntary manslaughter as set forth in the second count of the second amended affidavit now pending against him be dismissed.

RONALD RICHARD CICHOS, Defendant

BY: Warren Buchanan
John B. McFaddin (w a)
His Attorneys

STATE OF MEXICO }
} SS:
COUNTY OF QUAY }

RONALD RICHARD CICHOS, after being first duly sworn upon his oath, says:

That he is the defendant in the above entitled cause of action and that the facts stated in the foregoing VERIFIED SPECIAL PLEA OF FORMER JEOPARDY are true in substance and in fact.

Ronald Richard Cichos

(Ronald Richard Cichos)

SUBSCRIBED and SWORN to before me this 31 day of May, 1963.

Opal Skelton

(SEAL) NOTARY PUBLIC

My Commission expires:

Dec. 29, 1964 (R 83-87)

The trial Court sustained a demurrer to this special plea. (R. p. 99) Petitioner moved for directed verdicts upon this count because of former jeopardy both at the conclusion of the State's evidence and at the conclusion of all of the evidence. The pertinent parts here are as follows:

"Comes now the defendant, by his attorneys, Warren Buchanan and John B. McFaddin, at the conclusion of the prosecution's case in chief and after the prosecution has rested and before the introduction of evidence in support of the defendant's defense and moves the Court to forthwith direct a verdict herein for the defendant and to discharge the defendant from custody, and tenders and offers an instruction for such purpose, for the following reasons and for each of said reasons, separately and severally considered, to-wit:

• • • • •

"5. The defendant at the original trial of this case was acquitted and, by implication, found not guilty of involuntary manslaughter, as charged in Count II of the 2nd Amended Affidavit. The defendant cannot be tried more than one time for the same offense.

> Therefore, in the present trial, the jury should be directed to return a verdict finding the defendant not guilty of the offense of Involuntary Manslaughter charged in Count II of the 2nd Amended Affidavit."
>
> (R. 121-122)
>
> • • • • •

and

> "Comes now the defendant, by his attorneys, Warren Buchanan and John B. McFaddin, at the conclusion of all the evidence in the case, and before argument and before the Court has instructed the jury and moves the Court to forthwith direct a verdict herein for the defendant and to discharge the defendant from custody, and tenders and offers an instruction for such purpose, for the following reasons and for each of said reasons, separately and severally considered, to-wit:
>
> • • • • •
>
> "The defendant at the original trial of this cause was acquitted and, by implication, found not guilty of Involuntary Manslaughter, as charged in Count II of the 2nd Amended Affidavit. The defendant cannot be tried more than one time for the same offense. Therefore, in the present trial, the jury should be directed to return a verdict finding the defendant not guilty of the offense of Involuntary Manslaughter charged in Count II of the 2nd Amended Affidavit."
>
> (R. 128-129)

Both were overruled. Verdict was returned finding defendant guilty on Count 1 and a Motion in Arrest of Judgment, again presenting the question, was filed by Petitioner. (R. p. 233-235) Again such was overruled. Again, Petitioner was found guilty of reckless homicide. His Motion for New Trial promptly filed was overruled. The part of such Motion addressed to this question is as follows:

"2. Irregularities in the proceedings of the Court, or jury, and orders of the Court and abuse of discretion by which the defendant was prevented from having a fair trail in this, to-wit:

"The Court erred in sustaining the demurrer of the State of Indiana to the defendant's verified special plea of former jeopardy addressed to the charge against the defendant of the offense of involuntary manslaughter as set forth in the second count of the second amended affidavit upon which the defendant was tried in this cause."

(R. 247, par. 2)

* * * * *

"6. Error of law occurring at the trial in this, to-wit: The Court erred in over-ruling defendant's motion, at the conclusion of evidence presented by the State of Indiana, and after the State of Indiana had rested its case, that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd amended affidavit in this cause, and in refusing to give the jury an instruction then and there tendered to the Court by the defendant for such purpose, which said tendered instruction was as follows:

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE

Instruction No. 4

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offenses charged in the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT

"7. Error of law occurring at the trial in this, to-wit: The Court erred in over-ruling defendant's motion, after the State of Indiana and the defendant had rested, and after the introduction of all of the evidence in this cause had been completed, and before argument of counsel, that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd amended affidavit in this cause, and in refusing to give the jury an instruction then and there tendered to the Court by the defendant for such purpose, which said instruction was as follows:

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE

Instruction No. B

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offense charged in Count II of the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT

(R. 252, par. 6 & 7)

On appeal to the Supreme Court of Indiana Petitioner assigned as error the overruling of his motion for new trial and the Court (R. p. 1) deciding the case on its merits, held that former jeopardy although existing in this case had been waived by Petitioner's first appeal and that a second trial even as to the involuntary manslaughter was permissible without violation of the double jeopardy provisions of the Indiana Constitution because of such waiver. The Supreme Court of Indiana further held that no Federal question under the Fourteenth Amendment of the

Constitution of the United States was involved and no protection under that Amendment afforded to state action regarding double jeopardy. Upon re-hearing, the Indiana Supreme Court affirmed its earlier holding. Its language concerning the Federal question under the Fourteenth Amendment reads as follows:

> "*Three*: Appellant finally contends that retrial under both counts of the indictment constituted double jeopardy as prohibited by the Fifth Amendment and the due process clause of the Fourteenth Amendment to the U. S. Constitution.
>
> "Appellant asserts that, despite the established Indiana law on this issue, a change in Indiana Law is compelled by *Green v. United States* (1957), 355 U. S. 184, 2 L. Ed. 2d 199. However, among other facts which must be considered in relation to this assertion is the fact that the Green case was a federal case and therefore the rule enunciated arose under the U. S. Supreme Court's supervisory power over federal courts. The Green case involved a retrial on a murder charge, and resulted in a verdict of guilty of first degree murder, after a prior trial which had resulted in a second degree murder conviction had been reversed on appeal. Applying the Fifth Amendment double jeopardy provision, the Supreme Court held that a conviction of a lesser included offense amounted to an acquittal of the greater offense. Consequently, they reasoned that, on retrial, the accused could be tried for no greater charge than that for which he was originally convicted.
>
> "Aside from the obvious fact that the Green case, *supra,* involved the application of federal law and federal standards, there is the distinction concerning the character of the charges twice in issue. The offenses here involved are statutorily treated more as one offense with different penalties rather than viewing reckless homicide as an included offense in involuntary manslaughter.

"Since the elements of both counts are almost identical, it is recognized that a verdict of guilty of reckless homicide does not logically exclude the possibility of such a verdict on the charge of involuntary manslaughter for constitutional reasons as would be the case when a conviction is had on a lesser included offense. See Burns Ind. Stat. Anno. Sec. 47-2002 (1956 Repl.)

"When dealing with such interconnected offenses it is almost futile to attempt to sort out error and reverse a case only as to those errors which affected the defendant. Recognizing this futility, this state has accepted the position adopted by a substantial number of states, that when a defendant initiates an appeal asking for a new trial and the appeal disclosed error, the original trial is treated as a total nullity, leaving the parties as they were prior to the proceeding tainted with error. Burns Ind. Stat. Anno. Sec. 9-1902 (1956 Repl.) Compare: *Green v. United States, supra,* 355 U. S. 184, 216 n. 4; 2 L. Ed. 2d 199, 220 n. 4 (dissenting opinion).

"The protection against double jeopardy has never specifically been incorporated within the scope of the due process clause of the 14th Amendment, supra, by the Supreme Court. Arguable, double jeopardy provision is not necessarily a hallmark of either system, and it is reasonable to assume that some limitation on the total incorporation of the Fifth Amendment within the due process clause of the 14th Amendment may still exist.

"In view of the diverse reasoning by many of the states concerning double jeopardy in situations similar to the instant case, it does not appear that the federal standard of double jeopardy in *Green v. United States, supra,* can be deemed so fundamental a concept of ordered liberty as to compel a total revision of state interpretations of the doctrine, which interpretations of their own constitutions are primarily the prerogative of the states."

REASONS FOR GRANTING THE WRIT

The issue presented by this petition is that pertaining to the inclusion or exclusion of the double jeopardy provisions of the Fifth Amendment within the Fourteenth Amendment. Petitioner claims neither novelty in the question nor lack of precedent on the issue. He does submit, however, the necessity for a revisit to these precedents and a compelling timeliness for such to be accomplished. Petitioner also submits that the result in *Mapp v. Ohio,* 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961), and *Green v. United States,* 355 U. S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221, 61 A.L.R. 2d 1119 (1957), makes such inquiry more than expedient.

It would seem unassailable that the guidelines established in *Palko v. Connecticut,* 302 U. S. 319, 82 L. Ed. 288, 58 S. Ct. 149 (1937), as determinative of the conceptual nature of this problem have been unerringly recognized as valid. Thus rights become absorbed within the embrace of the Fourteenth Amendment because upon analysis of their nature in a democratic society they have become so fundamental as to meet the test there propounded by Justice Cardoza:

> "• • • Immunities that are valid as against the Federal Government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, became valid as against the States."

Petitioner here seeks not to dispute the rule in *Palko,* but rather its application or, more correctly, its lack of such. Specifically Petitioner seeks absorption of that portion of the Fifth Amendment providing that:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *"

into the Fourteenth Amendment guarantees.

In the instant case Petitioner was originally charged with the crime of reckless homicide, being Burns Ind. Stat. Anno. Sec. 47-2001 (a), as follows:

> "Driving—(a) Reckless Homicide. Any person who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person shall be guilty of the offense of reckless homicide. Any person convicted of reckless homicide shall be punished by a fine of not less than one hundred dollars ($100) or more than one thousand dollars ($1,000), or by imprisonment in the state farm for a determinate period of not less than sixty (60) days and not more than six (6) months, or by both such fine and such imprisonment, or by a fine of not more than one thousand dollars ($1,000) and imprisonment in the state prison for an indeterminate period of not less than one (1) year or more than five (5) years."

Subsequently, a separate count for involuntary manslaughter was added. This is Burns Ind. Stat. Anno. Sec. 10-3405, as follows:

> "*Manslaughter—Penalty*—Whoever voluntarily kills any human being without malice, expressed or implied, in a sudden heat, or involuntarily in the commission of some unlawful act, is guilty of manslaughter, and on conviction shall be imprisoned not less than two (2) years nor more than twenty-one (21) years. (Acts 1941, ch. 148, Sec. 2, p. 447)"

After two amendments, trial was had on both counts as provided in Burns Ind. Stat. Anno. Sec. 47-2002. That statute, although permitting the initial charge of both of-

fenses, recognized the *identity* of the offenses by providing that a judgment as to one was a bar to prosecution of the other. The statute reads as follows:

> "*Provisions for proceedings under preceding section.* All proceedings under section 52 (Sec. 47-2001) of this act shall be subject to the following provisions:
>
> (1) Each of the three (3) offenses defined in this section is a distinct offense. No one of them includes another, or is included in another one of them. Section 52, subsection (2) (Sec. 47-2001 (a)), in creating the offense of reckless homicide, does not modify, amend or repeal any existing law, but is supplementary thereto and to the other sections of this act. All three (3) of the offenses, or any two (2) of them, may be joined in separate counts in the same indictment or affidavit. One (1) or more of them may be joined in separate counts with other counts alleging offenses not defined in this section, such as involuntary manslaughter, if the same act, transaction or occurrence was the basis for each of the offenses alleged. With respect to the offenses of reckless homicide and involuntary manslaughter, a final judgment of conviction of one (1) of them shall be a bar to a prosecution for the other, or if they are joined in separate counts of the same indictment or affidavit, and if there is a conviction for both offenses, a penalty shall be imposed for one (1) offense only. (Acts 1939, ch. 48, Sec. 53, p. 289)"

The interrelation of the offenses is well established in Indiana. The statutory prohibition against a sentence as to both offenses and the bar created by the trial on one of such charges has evinced a legislative recognition of the jeopardy and collateral estoppel features and the qualitative identity of the offenses.

> **Rogers v. State, 227 Ind. 709, 88 N. E. 2d 755 (1949);**

State v. Beckman, 219 Ind. 176, 37 N. E. 2d 531 (1941);

Berman v. State, 232 Ind. 683, 115 N. E. 2d 919 (1953);

Idol v. State, 233 Ind. 307, 119 N. E. 2d 428 (1954).

In fact, the Indiana Court in this case recognized that the two charges were actually for the same offense with merely a difference in the penalty provided. The language at 208 N. E. 2d 688 is as follows:

> "The offenses here involved are statutorily treated more as one offense with different penalties rather than viewing reckless homicide as an included offense in involuntary manslaughter.
>
> "Since the elements of both counts are almost identical, it is recognized that a verdict of guilty of reckless homicide does not logically exclude the possibility of such a verdict on the charge of involuntary manslaughter for constitutional reasons as would be the case when a conviction is had on a lesser included offense. See Burns Ind. Stat. Anno. Sec. 47-2002 (1956 Repl.")

Thus neither offense is includable in the other.

Stevens v. State, 240 Ind. 19, 158 N. E. 2d 784 (1959).

In any event, trial resulted in a conviction as to the charge of reckless homicide, with no verdict as to the charge of involuntary manslaughter. The original appeal to the Indiana Supreme Court by Petitioner was successful and his Motion for New Trial was therefore sustained. An abundance of Indiana authority, recognized in the lower Court opinion, holds silence on a criminal charge tanta-

mount to acquittal. Rather than concede such, however, the lower court holds the elements of the two offenses to be identical with reckless homicide carrying the lesser penalty. Thus the Court in effect holds reckless homicide to be within the total coverage of involuntary manslaughter, a result completely opposed to the statute itself.

The new trial, however, was held as to both charges over Petitioner's strenuous and repeated objection. Thus, the involuntary manslaughter charge for which Petitioner had been once put in jeopardy and for which he had been legally acquitted was again the subject of the second trial against him. It is undoubtedly unique to permit a criminal defendant to be subjected in one trial to two counts which allege in reality the same offense (except for penalty). What is most repugnant, however, is that where a jury returns a verdict of guilty as to one of such offenses and what is legally an acquittal as to the other (such verdict is legally inconsistent at best, 60 Col. L. R. 998) and the defendant successfully appeals the conviction, he is then re-tried not only on the charge reversed, *but also upon the charge for which a legal acquittal had resulted.* The jeopardy to which Petitioner was initially subjected involved two criminal charges with identical qualitative elements and when he was re-tried for both of such charges (although he had legally been acquitted of one) he was in every real sense not only twice put in jeopardy, but actually *four* separate charges at two trials were brought against Appellant for the same offense. It would appear offensive enough to permit two charges for the same offense by separately enacting what amounts to the same criminal offense. However, to tolerate a second trial upon both of those charges where an acquittal as to one has already been effected is offensive to all of the basic concepts of

double jeopardy itself and of basic human rights inherent in a democratic society.

In *Green v. United States,* 355 U. S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221, 61 A.L.R. 2d 1119 (1957), this Court held violation of the Fifth Amendment a re-trial of a Defendant upon a greater charge after an appeal had been taken from a conviction of a lesser included charge. In so holding, the Court observed:

> "If Green had only appealed his conviction of arson and that conviction had been set aside surely no one would claim that he could have been tried a second time for first degree murder by reasoning that his initial jeopardy on that charge continued until every offense alleged in the indictment had been finally adjudicated." (355 U. S. 193)

Unfortunately, the assurance expressed by this Court that no one would make such a contention is destroyed here by the clear expression of the Indiana Supreme Court that exactly such a contention is not only made but is now the law in Indiana. That Court (Indiana) bases its opinion on a "waiver" theory and asserts that Petitioner permitted such a re-trial by his appeal of the original conviction. The waiver theory was thoroughly discarded in *Green* even where it involved degrees of the same includable offenses. Such certainly follows *a fortiori* where the offenses are distinctly made separate, non-includable offenses by statute.

> See: Cases collected in 80 A.L.R. 1108, as compared to those in 61 A.L.R. 2d 1141.

As stated in Green, "The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one

that should continue to be highly valued." (355 U. S. 198) This right is a fundamental right which should not be diluted by state reluctance to enforce whether under the guise of waiver or continuing jeopardy or whatever.

See: *Griswold,* The Long View, 51 A.B.A.J. 1017 (1965).

The opinion in this case recognizes its departure from *Green* and seeks justification for its pronouncements by diluting the quality of the protection against double jeopardy as "not necessarily" being "a hallmark of either system" (Federal or State). Such pronouncement in itself may portend the future of this protection in Indiana.

The difference in judicial result concerning specific issues and the not infrequent departure from such results is probably no more evident throughout the field of constitutional law than it is in concern over the ambit of the Fourteenth Amendment. Such has arisen not because of any disagreement over the *Palko* doctrine and in fact the recent trends of due process coverage rely as heavily on *Palko* as did the former. It seems indisputable that the process of change has arisen by "absorption", rather than "incorporation" and thus is one of progression and evolution rather than a simultaneity of adoption of the Bill of Rights into the Fourteenth Amendment.

See: Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment,* 78 Harv. L. Rev., 746.

Any juridicial concept of this nature has, of course, the attractiveness of practicality and the flexibility of adaptation to social change. *It necessarily requires, however, a frequent revisit of prior holdings on specific issues* not

to establish a gradual erosion of the rule but rather to prove its vitality. This has been repeatedly demonstrated throughout the history of the Court's concern with this area and has been evidenced most recently in several holdings on allied and closely analogous concepts.

Thus, historically the Fourteenth Amendment was held without relevancy or restraint to a state's action in regard to the "freedom of speech".

> *Prudential Ins. Co. v. Cheek,* 259 U. S. 530, 66 L. Ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27 (1922).

As Justice Brennan set forth in *Malloy v. Hogan,* 378 U. S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964), the advent of *Gitlow v. New York,* 268 U. S. 652, 69 L. Ed. 1138, 45 S. Ct. 625 (1925), initiated a series of decisions which now provide immunity from state invasion every First Amendment protection for the cherished rights of mind and spirit." (378 U. S. 5)

Similarly, the path of the Fourth Amendment has been gradual and perhaps long, but, nevertheless, straight and true. The expression of the federal "exclusionary" rule as applied to evidence obtained in an unreasonable search and seizure was clearly enunciated in *Weeks v. United States,* 232 U. S. 383, 58 L. Ed. 652, 34 S. Ct. 341 (1914). Subsequently, however, the Court refused to embrace this rule within the protection of the Fourteenth Amendment in regard to state action.

> *Wolf v. Colorado,* 338 U. S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359 (1949).

Evolvement of the search and seizure protection continued through the "shocks the conscience" rule of *Rochin v. California,* 342 U. S. 165, 96 L. Ed. 183, 72 S. Ct. 205,

25 A.L.R. 2d 1396 (1952), the overruling of the "silver platter doctrine" in *Elkins v. United States,* 364 U. S. 206, 4 L. Ed. 2d 1669, 80 S. Ct. 1437 (1960), to the ultimate departure from *Wolf* in *Mapp v. Ohio,* 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961), which absorbed the Fourth Amendment into the Fourteenth.

The full manifestation of *Mapp* was effectuated in *Murphy v. Waterfront Commission of New York,* 378 U. S. 52, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964).

The course of the Sixth Amendment's guarantee of the right to counsel was similar, although perhaps less arduous. Denial of absorption first occurred in *Betts v. Brady,* 316 U. S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 (1942). The pronouncements in *Gideon v. Wainwright,* 372 U. S. 335, 9 L. Ed. 799, 83 S. Ct. 792, 93 A.L.R. 2d 733 (1963), however, placed this guarantee within the framework of the Fourteenth Amendment.

See also: *Escobedo v. Illinois,* 378 U. S. 478, 12 L. Ed. 977, 84 S. Ct. 1758 (1964).

The companion protection against self-incrimination found in the Fifth Amendment leaves a similar history. There the original exploration of the problem occurred in *Twining v. New Jersey,* 211 U. S. 78, 58 L. Ed. 97, 29 S. Ct. 14 (1908), with the Court denying absorption. The doctrine was diluted in *Adamson v. California,* 332 U. S. 46, 91 L. Ed. 1903, 67 S. Ct. 1672, 171 A.L.R. 1223 (1947), and finally abandoned in *Malloy v. Hogan,* 378 U. S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964). It is significant to note that *Malloy* re-visited *Twining* only three years after its last affirmance in *Cohen v. Hurley,* 366 U. S. 117, 6 L. Ed. 2d 156, 81 S. Ct. 954 (1961).

Even the right to compensation provision of the Fifth Amendment shows a similarity of evolution from *Barron v. Baltimore,* 7 Pet 243, 8 L. Ed. 672 to *Chicago B & O R. Co. v. Chicago,* 166 U. S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897).

Here we concern ourselves again with the protections against double jeopardy. Admittedly, the holding in *Palko* stands as an obstacle to full recognition of the fundamental nature of this right and its protection as such from state encroachment. Petitioner submits that the very evolutionary process of assimilation of rights within the protection of the Fourteenth Amendment requires a re-visit to and reversal of *Palko,* especially in view of *Green.* In addition, however, several other compelling reasons exist for a review of the *Palko* holding.

Initially such is compelled by the recognition of the basic and fundamental nature of this right. Little would be gained by repetition of the historical development of double jeopardy. Such was ably done in the dissent of Justice Black in *Bartkus v. Illinois,* 359 U. S. 121, 3 L. Ed. 2d 684, 79 S. Ct. 676 (1959), at page 150. Suffice it here to note that no less of an opponent to "absorption" than the late Justice Frankfurter clearly recognized the fundamental and vital nature of this concept in his dissent in *Green* (355 U. S. 200-201). It is perhaps of some comparative significance that the privilege against self incrimination which now enjoys the cloak of the Fourteenth Amendment has a far less noble and historical ancestry and was not found in the Magna Carta, Petition of Right, Bill of Rights of 1689 or any other basic English source of our liberties and, in fact, seems to be able to trace its ancestry back to only vague origin about the seventeenth century.

Bram v. United States, 168 U. S. 532, 42 L. Ed. 568, 18 S. Ct. 183 (1897);

Brown v. Walker, 161 U. S. 591, 40 L. Ed. 819, 16 S. Ct. 644 (1896).

A review of the holding in *Palko* is compelled also because of the very fear expressed by Justice Black in *Bartkus,* concerning the frequency of such occurrences (359 U. S. 159-162). Such increase is a natural residual of greater penetration *into* the criminal field by the Federal Government so as to create the dual sovereignty possibility existing in *Bartkus,* as well as the creation of multiple crimes having the same elements such as exists here. Thus both the qualitative nature of the right and the quantitative frequency of its violation necessitate a departure from the holding in *Palko* and *Bartkus.*

CONCLUSION

It is virtually impossible to calculate the effect on Petitioner of the multiple charges and trials here. Such is not lessened by the fact that conviction was found in each instance on only the reckless homicide charge. In the context of motor vehicle deaths, Indiana has two identical offenses differing only in the severity of the punishment. The evil of identical offenses with separate and unequal penalties is that a charge of both provides prosecution leverage to secure a guilty plea or a conviction of the lesser punished one. This alone is of dubious fairness in the administration of criminal justice, but to twice subject an accused to such an inherently coercive jury choice is fundamentally unfair.

Petitioner respectfully requests that a writ of certiorari issue herein and that this cause and the fundamental question which it presents be assumed by this Court.

Respectfully submitted,

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